

Chapter 4. Permit and Environmental Review and Consultation Requirements

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This chapter provides preliminary information on the major requirements for permitting and environmental review and consultation for implementation of the DW project. Certain state and federal regulations require issuance of permits prior to project implementation; other regulations require agency consultation but may not require issuance of any entitlements prior to project implementation. The DW project's requirements for permits and environmental review and consultation may change during the EIR/EIS review process as discussions with involved agencies proceed.

INTRODUCTION

Table 4-1 provides a preliminary list of federal, state, and local permits and approvals that may be required for the DW project alternatives. Preparation of this EIR/EIS has proceeded concurrently with environmental review and consultation required by federal and state environmental laws other than NEPA and CEQA. Table 4-2 lists these environmental review and consultation requirements. The following sections describe the major state and federal laws that specify permitting and environmental review and consultation requirements. Not every permit or environmental review presented in Tables 4-1 and 4-2 is described.

CLEAN WATER ACT, SECTION 404 (33 USC 1344)

Under Section 404 of the Clean Water Act, a Department of the Army permit must be obtained from the Corps for the discharge of dredged or fill material into waters of the United States, including wetlands. The Corps reviews applications for permits in accordance with Section 404 guidelines, which have been established by the Corps and EPA. The guidelines require that "no discharge of dredged or fill materials shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative doesn't have other significant adverse environmental consequences". The Corps must also determine that the project is not contrary to the public interest (33 CFR 323.6).

An alternatives analysis was prepared and submitted to EPA and the Corps in partial compliance with EPA's Section 404(b)(1) guidelines (40 CFR 230.10[a], [b], and [d]) (see Appendix 4, "Section 404[b](1) Alternatives Analysis for the Delta Wetlands Project"). The information from this EIR/EIS will be used to complete compliance with the Section 404(b)(1) requirements and will be used during the Corps' public interest review.

To issue a permit under Section 404, the Corps must ensure that the discharge will not violate the state's water quality standards. Therefore, in California, the proponent of any activity that may result in a discharge to a surface water of the United States must obtain water quality certification or a waiver of certification from SWRCB (pursuant to Section 401 of the Clean Water Act).

RIVERS AND HARBORS ACT OF 1899, SECTION 10 (33 USC 403)

Section 10 of the Rivers and Harbors Act of 1899 prohibits the unauthorized obstruction or alteration of any navigable waters of the United States without a permit from the Corps. Examples of activities requiring a permit from the Corps are the construction of any structure in or over any navigable water; excavation or deposition of materials in such waters; and various types of work performed in such waters, including placement of fill and stream channelization.

The project applicant has submitted to the Corps a joint Department of the Army permit application pursuant to Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. The Corps' compliance with Section 404 of the Clean Water Act and NEPA will also

satisfy requirements under Section 10 of the Rivers and Harbors Act.

ENDANGERED SPECIES ACT (16 USC 1531 ET SEQ.)

Section 7 of the Endangered Species Act of 1973, as amended, requires federal agencies, in consultation with USFWS and NMFS, to ensure that their actions do not jeopardize the continued existence of endangered or threatened species, or result in the destruction or adverse modification of the critical habitat of these species. The required steps in the Section 7 consultation process are as follows:

- Agencies must request information from USFWS and NMFS on the existence in a project area of listed species or species proposed for listing.
- Following receipt of the USFWS/NMFS response to this request, agencies generally prepare a biological assessment (BA) to determine whether any listed species or species proposed for listing are likely to be affected by a proposed action.
- Agencies must initiate formal consultation with USFWS and NMFS if the proposed action would affect listed species.
- USFWS and NMFS must prepare a biological opinion to determine whether the action would jeopardize the continued existence of listed species or adversely modify their critical habitat.
- If a finding of jeopardy or adverse modifications is made in the biological opinion, USFWS and NMFS must recommend reasonable and prudent alternatives that would avoid jeopardy and the federal agency must modify project approval to ensure that listed species are not jeopardized and that their critical habitat is not adversely modified (unless an exemption from this requirement is granted).

The Section 7 consultation process for the DW project has been initiated with the Sacramento Endangered Species Office of USFWS and with NMFS. A BA was submitted to USFWS and NMFS for their review and concurrence on October 26, 1989. USFWS concurred with the 1989 BA conclusion that the DW project would not cause adverse impacts on the four listed species (valley elderberry longhorn beetle, bald eagle,

American peregrine falcon, and Aleutian Canada goose) (White pers. comm.); therefore, no formal consultation was required. Between 1989 and the drafting of this EIR/EIS, changes in the DW project alternatives and new listings required preparation of a supplemental BA for terrestrial species listed under the Endangered Species Act (Appendix H3, "Federal Endangered Species Act Biological Assessment: Impacts of the Delta Wetlands Project on Wildlife Species") and a new BA for fish species (Appendix F3, "Biological Assessment: Impacts of the Delta Wetlands Project on Fish Species"). Consultation with USFWS and NMFS is being performed concurrently with the Corps' NEPA process.

FISH AND WILDLIFE COORDINATION ACT (16 USC 661 ET SEQ.)

The Fish and Wildlife Coordination Act requires federal agencies to consult with USFWS and state fish and game agencies before undertaking or approving projects that control or modify surface water (water projects). This consultation is intended both to promote the conservation of wildlife resources by preventing their loss or damage and to provide for the development and improvement of wildlife resources in connection with water projects. Federal agencies undertaking water projects are required to include recommendations made by USFWS and state fish and game agencies in project reports, give full consideration to these recommendations, and include in project plans measures to reduce impacts on wildlife.

The Corps' compliance with the Fish and Wildlife Coordination Act (for permit review) is achieved by USFWS and DFG comments being obtained and, where possible, concerns being resolved through the CEQA/NEPA process (Elder pers. comm.).

NATIONAL HISTORIC PRESERVATION ACT (16 USC 470 ET SEQ.)

Section 106 of the National Historic Preservation Act requires federal agencies to evaluate the effects of federal undertakings on historical, archeological, and cultural resources. Agencies are required to identify historical or archeological properties near proposed project sites, including properties listed in the NRHP and those properties that the agency and the SHPO agree are eligible for listing in the NRHP. If the project is determined to have an adverse effect on NRHP-listed properties or those eligible for listing in the NRHP, the agencies are

required to consult with the SHPO and the ACHP to develop alternatives or mitigation measures to allow the project to proceed.

Section 106 consultation with the SHPO has been initiated for the DW project. A programmatic agreement (PA) outlining the steps and timing of compliance with Section 106 and addressing the project's potential effect on cultural resources has been drafted and is being circulated for signature by the ACHP, the SHPO, the Corps, SWRCB, and the project applicant.

AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978

This legislation sets forth the policy of the U.S. Department of the Interior to protect and preserve the observance of traditional Native American religions. The act requires federal agencies to evaluate their policies and procedures to ensure compliance with this policy.

Beginning in 1992 (before the beginning of any construction activities that could have project-related impacts on Native American resources), the Corps and SWRCB contacted local tribal representatives for input regarding the treatment of Native American cultural resources that may be affected by project construction and operation. This consultation process is being coordinated with compliance with Section 106 of the NHPA.

FARMLANDS PROTECTION POLICY ACT

Memoranda from the U.S. Council on Environmental Quality to heads of agencies dated August 30, 1976, and August 11, 1980, and the Farmlands Protection Policy Act of 1981 require agencies preparing EISs to include farmland assessments designed to minimize adverse impacts on prime and unique farmlands. As described in Chapter 3I, "Land Use and Agriculture", implementation of the DW project alternatives would cause losses of farmland acreage in areas in Contra Costa and San Joaquin Counties.

The environmental analysis of the DW project alternatives includes a thorough discussion of impacts on prime and unique farmlands. The analysis includes an evaluation of farmlands using CDC and NRCS (formerly SCS) classifications and an evaluation of the project's

effects on prime and unique farmlands as determined by the CDC's Farmland Mapping and Monitoring Program.

EXECUTIVE ORDERS 11988 (FLOODPLAIN MANAGEMENT) AND 11990 (PROTECTION OF WETLANDS)

Executive Order 11988 requires federal agencies to prepare floodplain assessments for proposed actions located in or affecting floodplains. If an agency proposes to conduct an action in a floodplain, it must consider alternatives to avoid adverse effects and incompatible development in the floodplain. If the only practicable alternative involves siting in a floodplain, the agency must minimize potential harm to or in the floodplain and explain why the action is proposed in the floodplain. The DW project involves compatible construction in a floodplain.

Executive Order 11990 requires federal agencies to prepare wetland assessments for proposed actions located in or affecting wetlands. Agencies must avoid undertaking new construction in wetlands unless no practicable alternative is available and the proposed action includes all practicable measures to minimize harm to wetlands. Chapter 3G, "Vegetation and Wetlands", and Appendix G5, "Summary of Jurisdictional Wetland Impacts and Mitigation", describe impacts on wetlands and mitigation measures for reducing significant impacts.

WATER COMMISSION ACT (CALIFORNIA WATER CODE SECTION 1000 ET SEQ.)

The Water Commission Act establishes a system of state-issued permits and licenses to appropriate water. SWRCB is responsible for administering appropriate water rights. Within its authority, SWRCB approves diversions of water to beneficial uses and changes in the purpose of use, points of diversion, and places of use of water.

**CALIFORNIA ENDANGERED SPECIES ACT
(CALIFORNIA FISH AND GAME
CODE SECS. 2050 ET SEQ.)**

The California Endangered Species Act requires a state lead agency to consult formally with DFG when a proposed action may affect state-listed endangered or threatened species. The provisions of the California Endangered Species Act and the federal Endangered Species Act will often be activated simultaneously. The assessment of project effects on species listed under both the California and federal Endangered Species Acts is addressed in USFWS's and NMFS's biological opinions. However, for those species listed only under the California Endangered Species Act, SWRCB must formally consult with DFG, and DFG must issue a biological opinion separate from USFWS's biological opinion. For this project, there are two species (Swainson's hawk and greater sandhill crane) listed only under the California Endangered Species Act. A separate BA has been prepared for these species. DFG will be required to issue a biological opinion on the project's effects on these species and the project applicants will be required to enter into an agreement with DFG regarding mitigation for management of the species. Consultation with DFG (and USFWS and NMFS) is being performed concurrently with SWRCB's CEQA process.

As a private applicant, DW must also comply with the take prohibitions of the California Endangered Species Act by obtaining an "incidental take" management permit pursuant to Section 2081.

CITATIONS

References to the Code of Federal Regulations (CFR) and the U.S. Government Code (USC) are not included in this list. CFR and USC citations in text refer to title and section (e.g., 33 CFR 323.6 refers to Title 33 of the CFR, Section 323.6).

Elder, Jean. Project manager. U.S. Army Corps of Engineers, Sacramento, CA. January 27, 1993 - telephone conversation.

White, Wayne S. Field supervisor. Fish and Wildlife Enhancement, Sacramento Field Office, U.S. Fish and Wildlife Service, Sacramento, CA. November 12, 1992 - letter regarding updated species list for the proposed Delta Wetlands' Delta Island Project, Lafayette, Contra Costa County, California.

Table 4-1. Permits and Approvals That May Be Required for the DW Project Alternatives

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Agency and Requirements	Agency Authority	Project Activities Subject to Requirements
FEDERAL		
U.S. Army Corps of Engineers		
Department of the Army permit pursuant to Section 404 of the Clean Water Act	The Corps issues permits for discharge of dredged or fill materials into waters of the United States, including wetlands; permits are issued following public interest review and analyses according to EPA's Section 404(b)(1) guidelines	Construction activities; location of siphon, pump, and recreation facilities; and other activities requiring the discharge of dredged or fill material into waters of the United States, including wetlands
Department of the Army permit pursuant to Section 10 of the Rivers and Harbors Act of 1899	The Corps issues permits for activities in or affecting navigable waters of the United States	Construction of intake structures, fish screens, discharge pumps, boat docks, or other facilities affecting navigable Delta waters
STATE		
California Department of Fish and Game		
Streambed alteration agreement	DFG enters into agreements with project applicants proposing changes in conditions of rivers, streams, lakes, or other regulated areas	Construction of intake structures, fish screens, discharge pumps, boat docks, or other facilities within regulated areas
California Department of Water Resources, Division of Safety of Dams		
Approval of plans and specifications	DOSD reviews and grants approval of plans and specifications for construction of reservoirs where the barrier will exceed 6 feet in height to ensure that no threat to life or property could occur because of seepage, earth movement, or other types of reservoir-induced dam failures	Designing and constructing water impoundment facilities (on Bouldin Island for Alternative 3)
Notice of completion and statement of actual cost; certificate of approval to impound water	DOSD evaluates the safety of newly constructed reservoirs and grants approval to initiate storage operations	Storage of water in a reservoir (on Bouldin Island for Alternative 3)
California State Water Resources Control Board		
Permit to appropriate and store water	SWRCB issues permit to allow the appropriation of unappropriated water from surface sources and grants approval to divert water to storage or for direct diversion and to change purpose of use	Diversion of Delta water, storage of appropriated water, and later discharge of water for sale as export or outflow
Statement of riparian water diversion and use	SWRCB requires submittal of a statement for applicants wishing to divert water under a riparian claim	Diversion of Delta water for circulation on the islands to provide wetlands and wildlife habitat benefits
Water quality certification pursuant to Section 401 of the Clean Water Act	SWRCB certifies that an applicant for a Department of the Army permit pursuant to Section 404 of the Clean Water Act complies with the state's water quality standards	Same as for Department of Army permit pursuant to Section 404 of the Clean Water Act

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Agency and Requirements	Agency Authority	Project Activities Subject to Requirements
Regional Water Quality Control Board		
Issuance of or waiver from discharge requirements	RWQCB may set waste discharge requirements for any proposed activity that would discharge waste into surface waters, projects that affect groundwater quality, and projects from which waste would be discharged in a diffused manner; waivers are also granted based on project sponsor's water quality control plans (RWQCB waste discharge requirements constitute NPDES permits where such permits are required)	Any earthmoving activities, such as grading, excavating, and other construction; discharge of water from dewatering activities into storm drains and creeks; and discharge of wastewater from conveyance cleaning
State Lands Commission		
Land use lease	The SLC grants a lease to use state-owned lands, including tidelands and submerged lands	Use of state-owned land for construction or siting of project facilities, such as boat docks, in tidelands and submerged lands
Dredging permit	The SLC issues a permit to parties proposing to dredge or deposit material on state-owned lands as elements of various projects	Construction of diversion and discharge facilities, if state-owned lands are dredged or altered
California Department of Transportation		
Encroachment permit	Caltrans issues encroachment permits for projects affecting areas within the rights-of-way (ROWs) of state-owned roadways	Activities that may affect SR 12
Department of Transportation, Division of Aeronautics		
State airport permit	Caltrans issues special use airport permits for airports not open to the general public, access to which is controlled by the owner in support of commercial activities, public service operations, and/or personal use	Operational activities of the airport on Bouldin Island that include agricultural and private commercial activities
REGIONAL AND LOCAL AGENCIES AND UTILITIES		
Bay Area Air Quality Management District		
Authority to construct/permit to operate	BAAQMD issues permits based on emission estimates and subsequent tests performed at the construction facility	Installation and subsequent operation of internal combustion equipment that generates any pollutant in excess of 150 pounds/day or is greater than 250 hp in size
San Joaquin Valley Unified Air Pollution Control District		
Authority to construct/permit to operate	SJVUAPCD issues permits based on the size of stationary or portable internal combustion engines proposed for use	Use, during construction and operation of the project, of stationary or portable internal combustion engines over 50 hp, if fueled by diesel or natural gas

Table 4-1. Continued

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Agency and Requirements	Agency Authority	Project Activities Subject to Requirements
Contra Costa and San Joaquin Counties		
Building permit	County planning department issues permits for all permanent structures	Construction of pump stations and recreation facilities
Road encroachment permit and design approval	County public works department issues permits and approves designs for construction within the ROWs of any county-maintained roads	Construction of conveyance facilities within the ROWs of county-maintained roads
Grading permit	County planning department and public works department issues permits for grading activities associated with construction activities	Grading of project site
San Joaquin County		
Minor use permit	County issues permits for the opening of a new airport or modification of an existing airport	Operational activities of the airport on Bouldin Island that include agricultural, recreational, and private commercial activities
Reclamation Districts		
Access easement and permission to cross levees	Individual reclamation districts grant easements and regulate access to levees under district jurisdiction	Construction of conveyance and related facilities on reclamation district lands

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Table 4-2. Other Environmental Review and Consultation Requirements

Agency and Requirements	Agency Authority	Project Activities Initiating Review and Consultation Requirements
FEDERAL		
U.S. Fish and Wildlife Service		
Consultation pursuant to Section 7 of the Endangered Species Act	Federal agencies must consult with USFWS when their actions may affect species listed under the Endangered Species Act	Corps approval of the project because the Corps has determined that the project may affect species listed under the Endangered Species Act
Fish and Wildlife Coordination Act	Federal agencies must consult with USFWS when undertaking projects that control or modify surface water	Corps approval of the project; consultation will be achieved through the Corps' NEPA process in approving the project
National Marine Fisheries Service		
Consultation pursuant to Section 7 of the Endangered Species Act	Federal agencies must consult with NMFS when their actions may affect anadromous or marine species listed under the Endangered Species Act	Corps approval of the project because the Corps has determined that the project may affect species listed under the Endangered Species Act
Environmental Protection Agency		
Clean Water Act and National Environmental Policy Act	EPA has oversight responsibility to ensure that federal and state agencies comply with the provisions of the Clean Water Act and NEPA	Need for a Department of the Army permit under Section 404 of the Clean Water Act and for preparation of an EIS under NEPA
Federal Aviation Administration		
Completion requirement of Form 7480-1 for change in use approval	FAA requires that all persons notify FAA prior to change in the status or use of a civil or joint-use airport	Operational activities of the airport on Bouldin Island, including agricultural and private commercial activities
STATE		
California Department of Fish and Game		
Consultation pursuant to the California Endangered Species Act	State lead agencies must consult with DFG when their actions may affect species listed under the California Endangered Species Act	SWRCB approval of the project because SWRCB has determined that the project may affect species only listed under the California Endangered Species Act (Swainson's hawk and greater sandhill crane)
Fish and Wildlife Coordination Act	Federal agencies must consult with state fish and game agencies when undertaking projects that control or modify surface water	Corps approval of the project; consultation will be covered through the Corps' NEPA and SWRCB's CEQA process in approving the project

Table 4-2. Continued

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Agency and Requirements	Agency Authority	Project Activities Initiating Review and Consultation Requirements
Office of Historic Preservation and Advisory Council on Historic Preservation		
Archaeological survey review (Archaeological Resource Protection Act, National Historic Preservation Act); PA for project effects on archaeological resources on the project site	The SHPO reviews and comments on any archaeological surveys; if resources are identified, the SHPO must be consulted to determine the eligibility for nomination to the National Register of Historic Places. The Advisory Council on Historic Preservation must concur with the PA.	Archaeological survey conducted and determinations of eligibility and effect prepared; PA circulated and signed by the project applicant, SWRCB, the Corps, the SHPO, and the Advisory Council on Historic Preservation
Native American Heritage Commission		
Consultation with certain Native Americans in compliance with California Public Resources Code Section 5097.98 and California Health and Safety Code Section 7050.5	The commission identifies persons who may be likely descendants of Native Americans whose remains may be found and requires that consultation with identified persons be initiated	Plans for physical alteration of a known cultural resource site that has a likely potential for containing remains of Native Americans
REGIONAL AND LOCAL AGENCIES		
Contra Costa and San Joaquin Counties		
Conformance with general plan	County planning department reviews local agency projects for conformity with the general plan	Project effects on land use

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